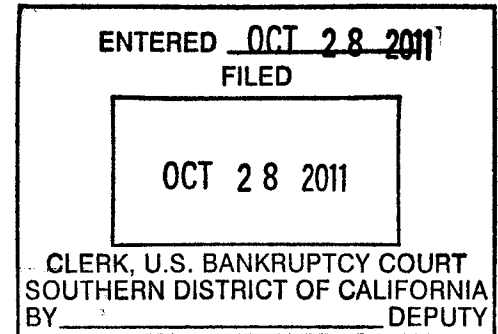


WRITTEN DECISION – NOT FOR PUBLICATION



UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA

In re
CRISTOBAL ESCOJIDO,
Debtor.

Case No. 11-07757-MM11

Chapter 11

MEMORANDUM DECISION AND ORDER
TO ROGER D. STACY TO RESPOND,
APPEAR AND SHOW CAUSE WHY HE
SHOULD NOT BE ORDERED TO
DISGORGE ATTORNEY'S FEES

Date: December 1, 2011

Time: 3:00 p.m.

Dept: 1

1 The Court issues this order to Attorney Roger Dale Stacy ("Stacy") to respond, appear and
2 show cause ("OSC") before this Court¹ on **December 1, 2011, at 3:00 p.m.**, as to why he should
3 not be required to disgorge all fees received by him or his firm from his client Cristobal Escodijo
4 in this case. This OSC is brought pursuant to this Court's authority under 28 U.S.C. § 157, 11
5 U.S.C. § 105, 11 U.S.C. § 329, Bankruptcy Rule 9011, CivLR² 83, and the Court's inherent power
6 to monitor the proceedings before it for the benefit of the Court, the profession and the public.
7 *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43, 47 (1991); *see also U.S. v. Wunsch*, 54 F.3d 579, 582-
8 83 (9th Cir. 1995) (attorney admitted to a particular bar may be disciplined for violations of that
9 bar's local rules of professional conduct).

10 To respect Stacy's due process rights, and to provide him a full and fair opportunity to
11 respond, the Court details the basis, grounds and nature of the discipline considered in this OSC.
12 *In re Thao Tran Nguyen*, 447 B.R. 268, 278 (B.A.P. 9th Cir. 2011).

13 **Factual Background**

14 As described in the Court's Memorandum Decision Re Ex Parte Motion to Vacate
15 Dismissal and Reinstate Chapter 11 Case and Automatic Stay entered on October 24, 2011,
16 Stacy's handling of this case was fraught with error from the outset. Stacy failed to properly close
17 his client's pre-petition bank account, in violation of US Trustee Program Policy 3-3.2.2. Stacy
18 also neglected to seek permission for use of cash collateral, which is mandatory under the
19 Bankruptcy Code and Ninth Circuit law. *Freightliner Market Dev. Corp. v. Silver Wheel*
20 *Freightlines, Inc.*, 823 F.2d 362, 368 (9th Cir. Or. 1987). Stacy filed every operating report late,
21 contrary to US Trustee Program Policy 3-3.3 that operating reports are due to be filed on the 20th
22 day following the month of the report. Contrary to Local Rule 2016-2, he also failed to obtain
23 court approval for payment of insider compensation before his client received such compensation.
24 Stacy neglected to seek employment authorization in a timely manner pursuant to 11 U.S.C. §
25 327(a), and his *nunc pro tunc* application, once filed, was fatally flawed.

26 ¹ References to the "Court" refer to the United States Bankruptcy Court, Southern District of California.

27 ² Local Rules of Practice for the United States District Court for the Southern District of California.

1 In frustration with the fitful progress of the case, the Court entered a formal scheduling
2 order in August 2011 requiring the Debtor to file a cash flow projection and three months of
3 operating reports, as well as address a number of other deficiencies by September 15. Despite
4 being ordered to timely comply with the prescribed deadlines, and being warned that dismissal
5 would be the sanction for non-compliance, September 15 passed with the Debtor timely meeting
6 only two of six of the deadlines. The Court then dismissed the case as warned in the scheduling
7 order.

8 Two weeks later, Debtor's counsel then filed an *ex parte* motion to vacate the dismissal,
9 simultaneously providing some, but not all, of the delinquent documents. The last delinquent
10 filings did not occur until nearly a month after the September 15 deadline. The US Trustee did not
11 oppose vacating the dismissal, although she did respond, pointing out the numerous deficiencies in
12 the Debtor's pursuit of his reorganization under Chapter 11. The motion to vacate the dismissal
13 was denied in a Memorandum Decision entered on October 24, 2011. As referenced in the
14 Memorandum Decision, the Court now issues this OSC to seek disgorgement of the \$16,000 in
15 fees paid to Stacy for this case.

16 **Disgorgement**

17 Under 11 U.S.C. § 329, the Court may disgorge the fees of an attorney whose
18 compensation exceeds the reasonable value of his services. The Court may deem fees
19 unreasonable and excessive based on an attorney's failure to perform required services or failure to
20 comply with disclosure requirements. *In re Basham*, 208 B.R. 926, 932-933 (9th Cir. BAP 1997),
21 *aff'd* 152 F.3d 924 (9th Cir. 1998) (disgorgement appropriate due to lawyer's absenteeism). The
22 Court may cancel counsel's fee agreement, or order the return of any such payment to the extent
23 that it is excessive. *Shapiro Buchman LLP v. Gore Bros. (In re Monument Auto Detail)*, 226 B.R.
24 219, 226 (B.A.P. 9th Cir. Cal. 1998) (services in excess of value result in court's reducing fee
25 award). Disgorgement of attorney's fees is not a punitive measure and does not constitute
26 "damages." *Berry v. United States Tr. (In re Sustaita)*, 438 B.R. 198, 213 (B.A.P. 9th Cir. 2010)
27 (disgorgement a civil remedy with no additional procedural protections). The purpose of
28

1 disgorgement is to compensate the Debtor for having paid more than the value of services
2 rendered to him by the bankruptcy attorney. *Id.* Stacy bears the burden of proof under 11 U.S.C.
3 § 329(b) to demonstrate the value of his services. *In re Gianulias*, 111 B.R. 867, 869 (E.D. Cal.
4 1989) (disgorgement appropriate for inadequate fee applications).

5 Stacy's handling of this case exhibited a pattern of ignored responsibilities, ineptitude, late
6 filings and absenteeism, leading to his client's case being dismissed. Due to the dismissal, Stacy's
7 services ultimately provided no benefit to his client, and Stacy should disgorge his fees to provide
8 restitution and protect the interests of the Debtor and the public. *California ex rel. Brown v.*
9 *Villalobos*, 453 B.R. 404, 412 (D. Nev. 2011) (disgorgement appropriate for its deterrent value
10 even where threat of future harm absent due to company dissolution). As a result, Stacy's
11 compensation resulted in no value to the Debtor in this case. *In re Avon Townhomes Venture*, 433
12 B.R. 269, 274 (Bankr. N.D. Cal. 2010) (disgorgement for failure to comply with court order and
13 mishandling of case). Given this series of missteps and failures to comply, the Court believes all
14 of the \$16,000 in fees received by Stacy should be disgorged.

15 Another basis of disgorgement is where counsel seeking to be retained pursuant to 11
16 U.S.C. § 327 fails to provide sufficient disclosure, is untimely in seeking retention approval, or
17 fails to comport with the procedural requirements of Bankruptcy Rule 2014. *Basham*, 208 B.R. at
18 932 (disgorgement of fees when compensation disclosure was filed albeit months late); *Atkins v.*
19 *Wain*, 69 F.3d 970, 973 (9th Cir. 1995) (*nunc pro tunc* approval for fee applications filed late is
20 limited to exceptional circumstances where an attorney can both satisfactorily explain his failure
21 to receive prior judicial approval, and show that he has benefited the bankruptcy estate in some
22 significant manner); *Law Offices of Nicholas A. Franke v. Tiffany (In re Lewis)*, 113 F.3d 1040,
23 1045 (9th Cir. 1997), *citing In re Walters*, 868 F.2d 665, 668 (4th Cir. 1989) (disgorgement for
24 deficient employment application).

25 Stacy's pattern of error and non-compliance repeats itself in many of the other Chapter 11
26 and 13 cases he files, generating a torrent of tardy and deficient operating reports, applications to
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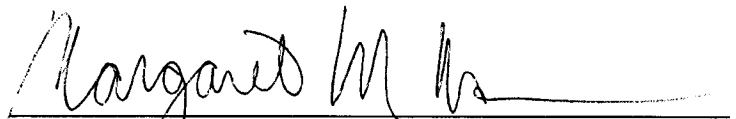
1 employ, misuse of cash collateral, and myriad other problems.³ This pattern defeats a potential
2 claim of ignorance or of mitigating circumstances and leads the Court to consider imposing
3 coercive sanctions so that any other missed deadlines or deficient pleadings will result in a \$2000
4 sanction per appearance. *In re Pagaduan*, 429 B.R. 752, 763-765 (Bankr. D. Nev. 2010) (attorney
5 sanctioned for repeated unethical conduct including failure to maintain client trust accounts).

6 **IT IS ORDERED THAT:**

- 7
- 8 1. Roger D. Stacy shall appear before this Court on **December 1, 2011 at 3:00**
9 **p.m.** in Department 1, Room 218, 325 West F Street San Diego, CA and show
10 cause why the Court should not impose sanctions against him, including
11 requiring him to disgorge all fees received from the client in this case, as well
12 as impose coercive sanctions for future violations.
 - 13 2. Stacy must file a written statement setting forth his response to this Order no
14 later than **November 17, 2011**. A copy of the Response must be served on the
15 U. S. Trustee and the Debtor. Any replies must be filed no later than
16 **November 28, 2011**.

17 DATED: October 28, 2011

18
19
20 By:



21 MARGARET M. MANN, Judge
22 United States Bankruptcy Court
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27 ³ See e.g. Case 10-18443-MM11, Docket 31, 45, 55, 62, 79, 86, 111; Case 10-18529, Docket 38, 49, 63, 75, 117; Case
28 11-06440-LA11, Docket 33; Case 11-10631-LT11, Docket 33, 67; Case 11-07769, Docket 18, 47